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SUPREME COURT OF THE UNITED STATES.

No. 118.

CHARLES KOCK, PL'FF IN ER.,

vs.

LOUIS EMMERLINGE.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE EASTERN DISTRICT OF LOUISIANA.

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Pleas and proceedings before the honorable the circuit court of the United States in and for the fifth judicial circuit of the United States, and eastern district of Louisiana, at the November term, A. D. 1857, of the said court, held at the city of New Orleans on the 11th day of November, 1857, in the case of

LOUIS EMMERLING
vs.
CHARLES KOCK.

Petition—Filed 9th May, 1857.

To the honorable the circuit court of the United States for the eastern district of Louisiana:

The petition of Louis Emmerling, a resident of New Orleans, an alien, subject of the Grand Duke of Hesse Darmstadt, humbly shows: That Charles Kock, a resident of New Orleans, and citizen of the State of Louisiana, is justly and truly indebted unto petitioner in the full sum of five thousand dollars for this, to wit: that petitioner, who is a broker for the purchase and sale of real estate, was employed by said Charles Kock to sell for him a certain plantation on the Bayou Lafourche, known as the Letory place, and by his written instructions to petitioner, dated on the 2d of April, 1857, the said Kock fixed his price for the sale at two hundred and fifty thousand dollars, payable one-fifth cash, and the remainder in four equal annual instalments, bearing eight per cent. interest, as will be seen by the letter of said Kock to petitioner, hereto annexed as an exhibit.

Petitioner shows that he sought for a purchaser for said plantation, visiting it at various times with different persons, and finally, on the 19th of April, went to said plantation with Mr. Jacob Denny, a resident of Louisiana, and succeeded in obtaining from him an agreement to purchase said place at the price fixed, provided the said Charles Kock would so change the terms of payment as to receive forty thousand dollars in cash, and the remainder in six annual instalments, bearing seven per cent. interest.

Petitioner further shows that said Kock consented to said change of terms; and on or about Wednesday, the 29th April, said Denney and said Kock met in New Orleans for the purpose of passing the title, and completing the sale, when said Kock insisted that for the first year's credit payment the purchaser should give a good city acceptance for the sum of thirty thousand dollars, agreeing that if this were done, the five thousand dollars remaining on this first term should be equally divided among the other five terms, so that the first year's payment would be thirty thousand dollars, and

the other five credit terms would be thirty-six thousand dollars each; and the said Kock stated that he would be willing to receive as satisfactory the acceptance of Messrs. Fellowes & Co., or of Messrs. Lauve & McColl, commission merchants, of New Orleans. Petitioner shows that although this demand was a new exaction, in violation of the contract already closed between the parties, said purchaser, Jacob Denney, asked said Kock to allow him one day to see whether he could comply with this demand, to which said Kock assented; that the said purchaser succeeded in making an arrangement with Messrs. Fellowes & Co. for the acceptance aforesaid, and on the morning next following the said demand of said Kock, informed him that he was ready to comply with his wishes, and offered to receive the titles, and pay the price according to the contract aforesaid; but said Kock refused to comply with his contract, stating, as an excuse, that he was going to Europe on a visit with his family, and had no time to execute the titles; that thereupon said Denney proposed to pay him the forty thousand dollars cash, and to give him the acceptance for thirty thousand dollars as aforesaid, and to await his return from Europe for the execution of the title-deeds, but said Kock utterly refused to execute the contract, or to sell the plantation as agreed on. Petitioner shows that he fully performed for said Kock the service for which he was engaged, and for which he is entitled to a reward or recompense at the rate of two per centum on two hundred and fifty thousand dollars, making the sum of five thousand dollars; said per centage being the usual well-established rate of broker's commission on sales of plantations. But said Kock refuses to pay petitioner for his services, for the sole reason that he (said Kock) capriciously changed his mind about making the sale, after the services which petitioner had engaged to render him had been fully performed. Wherefore petitioner prays that said Charles Kock be cited and condemned to pay him said sum of five thousand dollars, with interest and costs.

BENJAMIN, BRADFORD & FENNEY,
For Petitioner.

Exhibit annexed to Petition.

DONALSONVILLE, *Ap'l 2d*, 1857.

DEAR SIR: In reply to your favor of the 31st ult., I beg leave to state that I am not inclined to take the sum of 225 M. $ for the Letorey place, having refused the same offer, and even a better one, (interest to commence from 1 January last,) from as good a purchaser as I could wish to find. It is true, I offered the property at that price some 2 or three months ago, to a single person. I am glad, however, now, that it was not accepted, believing that I will be able to make a crop of from 60 to 80 mille $, and having a standing offer of 200 M. $, after the crop is secured and cashed by

me. The sum of 250 M. $ in five equal annual payments, with interest at the rate of 8 p. c. per annum, for the 4 credit payments, is the lowest price, which, at the present moment, I would take. It cost me as much as that when sugar was selling at 4 and 5 c., whereas, now it commands from 10 to 11 c. Sugar, if ever it should go back to lower prices, is bound to bring a fair price for several years to come yet, and I have no reason to sacrifice it just at the eve of better times.

Truly and respectfully, yours,

C. KOCK.

LS. EMMERLING, ESQ.,
New Orleans.

Answer—Filed 11th June, 1857.

LOUIS EMMERLING
vs.
CHARLES KOCK.

The defendant, by his counsel, comes into court, and reserving the right of amending these pleadings when said defendant shall have returned from Europe, and of pleading such further pleas as may be necessary to his defence, denies all and singular the allegations in said petition contained, and prays to be hence dismissed with costs.

ED. BRIGGS,
Of Counsel.

Minutes.

NEW ORLEANS, *Tuesday*, 10 *Nov.*, 1857.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge.

LOUIS EMMERLING
vs.
CHARLES KOCK. } 2765.

This cause was taken up and partially heard, and was thereupon, by consent, continued until to-morrow, at 10 o'clock a. m.

Minutes.—Submission of Cause.

NEW ORLEANS, *Wednesday*, 11*th Nov.*, 1857.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, dis't judge.

LOUIS EMMERLING
vs.
CHARLES KOCK. } 2765.

This cause, as continued from yesterday, was resumed, and was argued by counsel, and submitted to the court.

Statement of Facts.—Filed 20th Nov., 1857.

LOUIS EMMERLING
vs.
CHARLES KOCK.

The plaintiff is a broker, employed in finding purchasers for real estate. Hearing that defendant wanted to sell his plantation, he proposed to defendant to get a purchaser for him, and defendant consented.

The plaintiff found a purchaser, with whom defendant made a verbal agreement for the sale of the plantation, on terms agreed to by the defendant. The defendant, however, without any fault on the part of the purchaser, or of the broker, changed his mind and declined to sell. It is established by the proof that the price was two hundred and fifty thousand dollars, and the rate of commissions of brokers on sales of plantations was two per cent.

The only question of law in the case is, whether the broker is entitled to his brokerage, after finding a purchaser on terms satisfactory to the vender, if the latter declines to pass the titles in conformity with his agreement for the sale. In my judgment the broker has fully performed the condition on which his brokerage depended, and the defendant cannot refuse payment on the ground that the sale was not actually effected, when it was his own act that prevented the accomplishment of the sale.

THEO. H. McCALEB,
U. S. Judge.

Judgment.—November Term, 1857.

NEW ORLEANS, *Friday, 20th November*, 1857.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge.

LOUIS EMMERLING
vs.
CHARLES KOCK. } 2765.

This cause having been argued and submitted on a former day, and the court having considered the same, and being of opinion that the law and the evidence are in favor of the plaintiff, doth now order, adjudge, and decree, that the plaintiff, Louis Emmerling, do have and recover judgment against the defendant, Charles Kock, for the sum of five thousand dollars, with interest thereon, at the rate of five per cent. per annum, from the 27th May, 1857, until paid, and for costs of suit.

Judgment rendered 20th Nov., 1857.

Judgment signed 28th Nov., 1857.

THEO. H. McCALEB,
U. S. Judge.

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Petition for Writ of Error.—Filed 5th Dec'r, 1857.

To the honorable the circuit court of the United States, 5th circuit and eastern district of Louisiana:

The petition of Charles Kock respectfully shows; that he is aggrieved by the final judgment rendered against him in this honorable court, at the suit of Louis Emmerling, No. 2765 of the docket, and is informed that there is error therein to his prejudice, and he is desirous that a writ of error be allowed him therefrom to the Supreme Court of the United States; wherefore, he prays that a writ be allowed him, returnable to the next term of the Supreme Court of the United States, and that the same may operate as a supersedeas, upon his giving bond in such amount as the court may order; and he will ever pray, &c.

ED. BRIGGS,
Of Counsel.

Minutes.—Order allowing Writ.

NEW ORLEANS, *Saturday, 5th Dec'r*, 1857.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, dis't judge. Absent, Hon. J. A. Campbell, presiding judge.

LOUIS EMMERLING
vs. } 2765.
CHARLES KOCK.

On motion of Ed. Briggs, of counsel for defendant, and on his presenting and filing the petition of said defendant, representing that he is aggrieved by the judgment rendered against him herein, and praying a writ of error therefrom to the Supreme Court of the United States, it is ordered that a writ of error be allowed to the next term of the Supreme Court of the United States, and that the same operate as a supersedeas, upon the plaintiff's giving bond, conditioned according to law, in the penal sum of seven thousand five hundred dollars, with W. T. Williams as surety thereon.

Bond for Writ of Error—Filed 5th December, 1857.

Know all men by these presents, that we, Charles Kock as principal, and W. T. Williams as surety, are held and firmly bound unto Louis Emmerling in the full and just sum of seven thousand five hundred dollars, to be paid to the said Louis Emmerling, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this fifth day of December, A. D. 1857.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of

Louisiana, at New Orleans, in a suit pending in said circuit court, wherein the said Louis Emmerling was plaintiff and the said Charles Kock was defendant, judgment was rendered against the said Charles Kock, defendant; and the said Charles Kock having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Louis Emmerling, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next: Now, the condition of the above obligation is such, that if the said Charles Kock shall prosecute his said writ to effect, and answer such judgment and all damages and costs if he shall fail to make his plea good, then the above obligation is to be void, else to remain in full force and virtue.

C. KOCK, [SEAL.]
W. T. WILLIAMS, [SEAL.]

Sealed and delivered in the presence of—
ED. BRIGGS,
M. W. CHAPMAN.

CIRCUIT COURT OF THE UNITED STATES,
Fifth Judicial Circuit, and Eastern District of Louisiana.

CLERK'S OFFICE.

I certify that the foregoing 13 pages contain and form a full, true, and perfect transcript of the record and proceedings had in the case of Louis Emmerling vs. Charles Kock, No. 2765 of the docket of the said court.

[SEAL.] Witness my hand and the seal of the said court, at New Orleans, this ninth day of December, A. D. 1857.

J. W. GURLEY, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or one of you, between Louis Emmerling, plaintiff, and Charles Kock, defendant, a manifest error hath happened, to the great damage of the said Charles Kock, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ,

so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this fifth day of December, in the year of our Lord one thousand eight hundred and fifty-seven.

[SEAL.]

J. W. GURLEY,
Clerk of the United States Circuit Court for Eastern District of Louisiana.

THE UNITED STATES OF AMERICA.

The President of the United States, to Louis Emmerling, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, wherein Charles Kock is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this fifth day of December, in the year of our Lord one thousand eight hundred and fifty-seven.

THEO. H. McCALEB,
U. S. Judge.

[Endorsed:] United States circuit court. No. 2765. Charles Kock, pl. in error, vs. Louis Emmerling, def't in error. Citation in error.

Marshal's Return.

Rec'd December 5th, 1857, and on the 10th day of December, 1857, served copy of the within citation in error on Louis Emmerling, in person, in the city of New Orleans, and ret'd December 11th, 1857.

CHAS. CATOIR, *D'y M.*